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January 14, 2004

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T.R.A. DOCKET ROOM

VIA HAND DELIVERY

Hon. Ron Jones, Hearing Officer
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Implementation of the Federal Communications Commission's
Triennial Review Order (Nine-month Proceeding)(Switching)*
Docket No. 03-00491

Dear Director Jones:

Enclosed are the original and fourteen copies of BellSouth's *Memorandum in Opposition to Aeneas's Motion for Compensation Regarding Response to Subpoena Duces Tecum*. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch

cc: Paul Rice, Esquire

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

**In Re: *Implementation of the Federal Communications Commission's
Triennial Review Order (Nine-month Proceeding) (Switching)***

Docket No. 03-00491

**BellSouth Telecommunications, Inc.'s Memorandum in Opposition to
Aeneas Communications, LLC's Motion for Compensation
Regarding Response to Subpoena *Duces Tecum***

BellSouth Telecommunications, Inc. ("BellSouth") hereby opposes the motion of Aeneas Communications, LLC ("Aeneas") for compensation for time spent in responding to a subpoena *duces tecum* issued by the Tennessee Regulatory Authority (the "Authority" or "TRA") at the request of BellSouth.¹ The ostensible "motion for compensation" is contained in one of two documents filed by Aeneas with the Authority on December 10, 2003, both of which are captioned "Response of Aeneas Communications, LLC to Subpoena *Duces Tecum* Issued on Behalf of BellSouth on November 14, 2003." The response containing the motion for compensation is on file with the Authority and available for public inspection, whereas the six-page response containing the substantive information and documents responsive to the subpoena is presumably filed under seal pursuant to the November 21, 2003 Order Adopting Proposed Protective Order entered in this docket.

BellSouth's subpoena to Aeneas was issued on November 14, 2003, and required Aeneas to supply various documents and information at a deposition to be conducted on December 8, 2003. Alternatively, Aeneas was notified that BellSouth

¹ It is worth noting that of the 26 subpoenas issued by BellSouth in this docket, Aeneas is the only witness to request compensation for the costs of compliance.

would dispense with the deposition if the requested documents and information were provided by December 8, 2003.² See subpoena and cover letter (copies attached hereto as Exhibit A). Aeneas was late in responding to the subpoena, supplying information and documents which were received by BellSouth on or after December 11, 2003, and which arrived at BellSouth by U.S. Postal Service with a postmark of December 10, 2003.³ Aeneas filed its response containing the motion for compensation with the Authority on December 10, 2003, two days after the December 8 date specified in the subpoena for compliance.

Aeneas's motion for compensation should be denied for at least three reasons. First, the motion was untimely under the specific language of Rule 45.02, which provides that a motion under that rule must be "made promptly and in any event at or before the time specified in the subpoena for compliance therewith." See Tenn. R. Civ. P. 45.02. Second, the motion is flatly inconsistent with the procedure contemplated in Rule 45.02 because it seeks compensation for its already accomplished action in responding to the subpoena, rather than seeking to quash or modify the subpoena as provided in the rule. Third, Aeneas has made no showing that the subpoena was "unreasonable and oppressive" as is required by Rule 45.02 before any action by the court (or, here, the TRA) is authorized.

² The subpoena *duces tecum* was issued pursuant to Authority Rule 1220-1-3-.13, which authorizes issuance of subpoenas in accordance with the Tennessee Rules of Civil Procedure, which in turn require that all subpoenas must command the witness to appear at a trial, hearing or deposition. See Tenn. R. Civ. P. 45.07. As is typical practice in Tennessee, BellSouth noted that an actual deposition would not be necessary if the documents and information were provided by Aeneas by the specified date.

³ BellSouth will provide an affidavit from a BellSouth employee with specific knowledge of these facts, if the Authority so desires.

I. The Motion for Compensation was Untimely.

While Tennessee Rule of Civil Procedure 45.02 was designed to protect non-parties from the burdens of responding to unreasonable and oppressive subpoenas, certain procedural requirements are built into the rule which are prerequisites to a non-party obtaining the relief specified therein. Chief among those procedural requirements is that motions made pursuant to the rule be made in a timely fashion. Specifically, Rule 45.02 provides as follows:

A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, **upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith**, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(emphasis added).

This timeliness requirement is understandable in light of the fact that Rule 45.02 is primarily designed to protect non-parties from having to respond to subpoenas that are, in fact, “unreasonable and oppressive.” Quite naturally, the rule contemplates a non-party who actually finds the demands of a subpoena to be “unreasonable and oppressive” to seek protection from the court in a timely fashion, and at the very least, before actually responding to the subpoena. After all, if compliance with the subpoena would truly be “unreasonable and oppressive,” one would expect that the non-party subject to it would seek relief before incurring the purportedly unreasonable burden of responding.

Of course, in this case, Aeneas has done exactly the opposite. Aeneas filed a response to BellSouth's subpoena and then, almost as an afterthought, made a motion for compensation for the time spent in compiling its response. Significantly, the motion for compensation was not even filed by Aeneas until two days after the time for compliance set forth in the subpoena. The subpoena and its accompanying cover letter clearly set forth that December 8, 2003, was the date of the deposition or the date by which responsive information and documents could be produced to avoid the deposition. Aeneas's motion for compensation was not filed at the TRA until December 10, 2003.

Rule 45.02 clearly requires that a motion be made "promptly" and, at the very least, "before" the time for compliance. Here, Aeneas's motion was filed with the TRA two days after the time for compliance and therefore failed to comply with Rule 45.02. Aeneas's failure to comply with the rule's procedural requirements strongly suggests that the compensation sought here was only an afterthought. Had Aeneas truly considered BellSouth's subpoena to be "unreasonable and oppressive," it would certainly have sought Rule 45.02's protections before actually responding to the subpoena. Aeneas's motion for compensation was untimely and should be denied on this basis alone.

II. The Motion for Compensation is Inconsistent with Rule 45.02.

Not only was Aeneas's motion for compensation untimely, but also completely inconsistent with the procedure contemplated in Rule 45.02. Rule 45.02 provides for quashing or modifying a subpoena found to be "unreasonable and oppressive," or, alternatively, for payment of the costs of compliance with a subpoena that would

otherwise be “unreasonable and oppressive.” Nowhere does the rule allow the subpoenaed witness to respond to the subpoena as issued and then come in, after the fact, and ask for compensation. That is exactly what Aeneas has done in this instance.

The language of Rule 45.02 is clear: a subpoenaed witness is authorized, within the time constraints discussed above, to move to have a subpoena quashed or modified upon a showing that it is both “unreasonable” and “oppressive.” If the court finds that the subpoena is, in fact, “unreasonable and oppressive,” it can grant the motion to quash or modify or “condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.” Clearly, the court (and here, the TRA) is not authorized to simply order the payment of compensation after a witness has responded to a subpoena. Under the rule, there must first be a motion to quash or modify, then a finding that the subpoena is “unreasonable and oppressive” and thus deserving of being quashed or modified, and then a conditional denial of the motion to quash or modify upon the advancement of reasonable costs.

This procedure makes good sense in light of the policy behind Rule 45.02: the policy of protecting non-party witnesses from having to respond to “unreasonable and oppressive” subpoenas. The rule puts in place a procedure that will protect a non-party witness from ever having to incur the costs associated with responding to a truly “unreasonable and oppressive” subpoena. It accomplishes this by first requiring the witness to seek a motion to quash or modify supported by a showing of the subpoena’s unreasonableness and oppressiveness and then, second, allowing the court to either

grant the motion or condition denial on **advancement** of the reasonable costs of compliance.

Significantly, this procedure allows the party that issued the subpoena the opportunity to withdraw a subpoena found to be "unreasonable and oppressive" rather than advance the costs. To allow the witness to simply respond to the subpoena and then come in, after the fact, and request compensation, reverses entirely the procedure provided for in Rule 45.02. The TRA should not favor Aeneas's attempt to do so in this case. The motion for compensation should be denied on this basis alone.

III. Aeneas Has Not Shown that the Subpoena was "Unreasonable and Oppressive" as Required by Rule 45.02

In addition to the procedural deficiencies and inconsistencies discussed above, Aeneas's motion for compensation completely fails to demonstrate, or even allege, that the subpoena served on it was "unreasonable and oppressive." In fact, Aeneas's one page motion asserts only in a conclusory fashion that the subpoena's requests for documents are "unduly burdensome and not reasonably calculated to lead to the discovery of relevant evidence." As stated above, that is not the showing required by Rule 45.02 and, even were it on point, its conclusory nature falls short of what the Tennessee Court of Appeals has required of a party seeking to limit discovery. See *Duncan v. Duncan*, 789 S.W.2d 557, 560-61 (Tenn. Ct. App. 1990).

While there are no reported cases interpreting the "unreasonable and oppressive" standard articulated in Rule 45.02, the Tennessee Court of Appeals has been clear about the requirements for a party seeking to limit discovery generally:

In light of the rules' broad policy favoring discovery, the party opposing discovery must demonstrate with more than conclusory statements and generalizations that the

discovery limitations being sought are necessary "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." A trial court should decline to limit discovery if the party seeking the limitations cannot produce specific facts to support its request.

Duncan v. Duncan, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990). (citations omitted).

A subpoena to a non-party witness is just as much a part of the discovery process as are interrogatories or requests for production addressed to a party. Moreover, a motion under Rule 45.02 to quash or modify a subpoena clearly seeks to limit discovery. Of course, as noted above, a court can deny a motion to quash or modify on condition that reasonable costs be paid, but that presupposes that the court has already made the finding that the subpoena is "unreasonable and oppressive."

The only facts asserted in Aeneas's motion for compensation are that it took "6 man-hours" for it to collect and assimilate the information requested in BellSouth's subpoena and that this resulted in a "shut down" of "several administrative operations." Why a mere six man-hours of time for compliance with a subpoena should be considered "unreasonable and oppressive" is never addressed. Nor is it stated why a mere six man-hours would necessitate a "shut down" of any operations. Nowhere does Aeneas discuss any specific facts showing that six hours to comply with this subpoena was unreasonable and oppressive. If this subpoena had truly been unreasonable and oppressive, Aeneas would have made a prompt and timely motion to quash or modify as Rule 45.02 requires, rather than simply providing its responses and seeking recovery of compensation after the fact.

Lastly, it is important to note that the information that BellSouth sought in the subpoena will be extremely important to the Authority in fulfilling its task of implementing

the Federal Communications Commission's ("FCC") Triennial Review Order.⁴ Specifically, BellSouth sought to obtain by the subpoenas it issued, specific information about switches owned or operated by Competitive Local Exchange Carriers ("CLECs") such as Aeneas. The questions were designed to elicit information that would ultimately assist the Authority in making the market-by-market fact finding determinations required by the Triennial Review Order. As a CLEC subject to the Authority and the FCC, Aeneas's inferred complaint that the subpoena was "unreasonable and oppressive" rings hollow. The stated small amount of time (six man-hours) required to respond falls far short of any showing sufficient under Rule 45.02. The motion for compensation should be denied on this basis alone.

CONCLUSION

Aeneas has made an untimely motion for compensation that disregards the procedures set forth in Tennessee Rule of Civil Procedure 45.02. Moreover, the motion is lacking in any factual assertions demonstrating why the professed six man-hours required to comply with the subpoena were "unreasonable and oppressive." In light of the TRA's role in implementing the FCC's Triennial Review Order and the limited nature

⁴ Report and Order and Order on Remand in CC Docket No. 01-338, CC Docket No. 96-98, CC Docket No. 98-147, FCC 03-36 (adopted Feb. 20, 2003 and released Aug. 21, 2003).

of the inquiry in BellSouth's subpoena to issues directly bearing on the FCC's inquiry and analysis, Aeneas's after-the-fact request for compensation should be denied.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



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November 14, 2003

Aeneas Communications, LLC
Mr. Jonathan V. Harlan
301 S. Church St.
Jackson, TN 38301

Re: *Implementation of the Federal Communications Commission's Triennial
Review Order (Nine-month Proceeding)(Switching)*
Docket No. 03-00491

Dear Registered Agent:

Attached is a Subpoena *Duces Tecum* for Deposition issued by the Tennessee Regulatory Authority. Also attached is a Protective Order that is expected to be entered by the Tennessee Regulatory Authority, or its Hearing Officer in this proceeding. Paragraph 13 of the Protective Order provides that:

13. Non-party witnesses, including entities responding to subpoenas, data requests or other third party discovery propounded by parties or the TRA, shall be entitled to invoke the provisions of this Order by designating information disclosed or documents produced for use in this action as CONFIDENTIAL in which event the provisions of this Order shall govern the disclosure of information or documents provided by the non-party witness. A non-party witness' designation of information as confidential may be challenged under Paragraph 11 of this Order.

If the recipient of this Subpoena provides information which is fully and completely responsive to the Subpoena by BellSouth by December 8, 2003, BellSouth will agree to dispense with the oral deposition. Please contact Carolyn Hanesworth at 615/214-6324 to make any necessary arrangements regarding the scheduling of depositions.

Very truly yours,



Guy M. Hicks

GMH:ch

Exhibit A

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Implementation of the Federal Communications Commission's
Triennial Review Order (Nine-month Proceeding)(Switching)*

Docket No. 03-00491

SUBPOENA DUCES TECUM FOR DEPOSITION

To: Aeneas Communications, LLC, Mr. Jonathan V. Harlan, 301 S. Church St.,
Jackson, TN 38301

YOU ARE COMMANDED to appear before a person authorized by law to take depositions at the offices BellSouth Telecommunications, Inc., 333 Commerce Street, Suite, 2101, Nashville, TN 37201 on December 8, 2003, at 4:00 p.m. to testify in this action, and to have with you at that time and place the following:

1. Documents reflecting your ownership and use of switches; including switches that may be used to provide service to retail customers in Tennessee and switches that might be used by other carriers to provide service to customers in Tennessee.
2. All information set forth in the Attachment, "Matters upon which examination is requested per T.C.A. §§ 4-5-311 and 65-2-102."

These items will be inspected and may be copied at that time. You will not be required to surrender the original items.

YOU ARE SUBPOENAED to appear by the following attorney(s) and, unless excused from this subpoena by these attorney(s) or the Authority you shall respond to this subpoena as directed.

Guy M. Hicks
Joelle J. Phillips
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

Date of Issuance: 11/14/03

Richard Collier
Richard Collier, General Counsel
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

MATTERS UPON WHICH EXAMINATION IS REQUESTED
PURSUANT TO T.C.A. §§ 4-5-311 and 65-2-102

1. Please provide the 11-digit COMMON LANGUAGE® Location Identifier (CLLI™) of each switch used to provide qualifying service¹ anywhere in the state of Tennessee that is owned by your company. If you lease, rent or otherwise obtain switching capacity on a switch that you do not own (other than from an incumbent Local Exchange Carrier), provide the same information regarding all such switches.
2. For every switch identified in response to Question 1, provide the number of DS-O/voice grade equivalent access lines that switch is equipped to provide. If you lease, rent or otherwise obtain capacity on someone else's switch, provide the DS0/voice grade equivalent access lines associated with the capacity you have obtained.
3. For every switch identified in response to Question 1, provide the number of DS-O/voice grade equivalent access lines current in use and state the date for which such information is provided.
4. State whether each switch identified in response to Question 1 serves residential customers.
5. Does this switch serve customer locations with:
 - a. 1 line only?
 - b. 2 or fewer lines?
 - c. 3 or fewer lines?
 - d. 4 or fewer lines?
 - e. 5 or fewer lines?
 - f. 6 or fewer lines?
 - g. 7 or fewer lines?
 - h. 8 or fewer lines?
 - i. 9 or fewer lines?
 - j. 10 or fewer lines?
6. For each grouping of customer locations identified in Question 5 (locations with 1 line, locations with 2 or fewer lines, etc.), provide:

¹ A "qualifying service" is a telecommunications service that competes with a telecommunications service that has been traditionally the exclusive or primary domain of incumbent LECs, including, but not limited to, local exchange service, such as plain old telephone service, and access services, such as digital subscriber line services and high-capacity circuits. 47 C.F.R. § 51.5.

- a. The individual customer locations. Initially, it will be sufficient to provide these locations by wire center service area. If that information is not readily available, then the information should be provided by actual customer address. To explain further, this question asks you to provide, initially by wire center service area, the number of customer locations you serve that have one line, two lines or fewer, three lines or fewer, etc. If you cannot provide the information by wire center service area, then provide this information by actual customer location, i.e. Customer A is located at 1234 Broadway, Nashville, Tennessee, and has one line, and so forth.
 - b. The number of lines at each location that are used to provide voice service, and the number of lines that are used to provide data service, identified separately. If each line is used to provide both voice and data, so indicate.
 - c. If you know that the specific customer location is served by lines provided by another CLEC, or by an ILEC, provide the number of DS0/voice grade equivalent lines provided at each customer location by other CLECs or ILECs.
7. Provide the street address (e.g., 123 Main Street), the city (e.g., Nashville), and the state (e.g., TN) where every switch identified in response to Question 1 is located.
8. Do you offer to provide or do you provide switching to other carriers for their use in serving customers? If yes, state: (a) the carriers to whom you provide switching; (b) the types of service, if known, that are provided by the carriers to whom you provide switching; (c) whether you will provide switching to any requesting carrier; (d) identify each wire center district (by eight digit CLLI code) in which wholesale switching is available.
9. State whether you have any plans to terminate your service in any area in Tennessee that is currently served by the switches identified in response to Question 1. If you do, identify the areas where you intend to terminate service (and by areas we mean geographic areas, not individual customers).

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2004, a copy of the foregoing document was served on the parties of record, via the method indicated:

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

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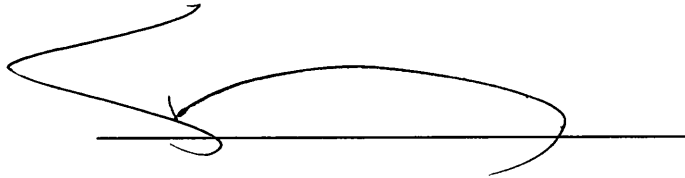
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A handwritten signature in dark ink, appearing to read 'Ken Woods', is written over a horizontal line. The signature is stylized with a large loop and a trailing flourish.